1997

Doty Lyn Brown v. State of Utah; Henry Galetka : Brief of Appellant

Utah Court of Appeals

Doty Lyn Brown; Utah State Prison.
Angela F. Micklos; Assistant Attorney General;Jan Graham; Utah Attorney General.

IN THE SUPREME COURT OF THE STATE OF UTAH

DOCKET NO. 970095-CA

DOTY LYN BROWN Petitioner/Appellant -v- STATE OF UTAH; HENRY GALETKA, Warden Appellee	Case Number 960396 97-0[illegible]A Priority Number Three

This is an appeal from the Judgment and Order entered on August 9, 1996 ordering the dismissal of the Appellant's Petition for extraordinary relief filed in the Third District Court, Judge L. A. Dever presiding.

Utah Attorney General's Office
Appeals Division
236 State Capitol
Salt Lake City, Utah 84114

Attorney for Appellee

DOTY L. BROWN

(Appellant Pro Se'
#19942 0Q4
P.O. Box 250
Draper, Utah 84020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE STATUES AND RULES
(From the Utah Code Annotated)

RULES

U. S. CONSTITUTIONAL PROVISIONS

STATE CONSTITUTIONAL PROVISIONS

OTHER FEDERAL PROVISIONS

IN THE SUPREME COURT OF THE STATE OF UTAH

DOTY LYN BROWN Petitioner/Appellant	)	Brief of Appellan
v	)	Case Number 960396
STATE OF UTAH; HENRY GALETKA, Warden Appellee	)	Priority Number Three

- JURISDICTION -

Utah Code Annotated §78-2-2 (3)(i) confers jurisdiction on this Court to decide this matter in that it involves a conviction of second degree murder, a first degree felony.

- STATEMENT OF ISSUES AND STANDARD OF REVIEW -

ISSUE ONE: Because the District Court dismissed the case without hearing, was the Court in a position to determine that the case was frivolous when the attachments to the Petition clearly proved the Appellant's contentions to each issue establishing grounds for relief?

This Court, in reviewing a decision to dismiss a Petition for extraordinary relief, reviews that decision to dismiss for correctness; State-v-Pena 869 P2d 932, 935 (Utah 1994); Smith-v-Cook 803 P2d 788, 790 (Utah 1990).

ISSUE TWO: Did the District Court abuse its discretion in not letting the Appellant proceed with his ineffective assistance of Counsel and conflict of interest claims on his Appellate Counsel when this issue established "good cause" and "unusual circumstances"

to rehash some issues raised on appeal and factually supported the request for "Habeas Relief", on the grounds of plain error? Standard of review is a mixed question of fact and law, Strickland-v-Washington 466 US 688, 698 (1984). Because there are no findings of fact in this case but the issue is documented in the record presents this as a question of law which is reviewed for correctness, State-v-Johnson 823 P2d 484, 487 (UT App. 1991). However, in an abundance of caution, the Appellant includes as part of this appeal, how this appeal presents exceptional circumstances and/or circumstances constituting plain error, State-v-Archambeau 820 P2d 920, 922-23 (UT Ct App. 1991), in the event these issues are determined to be raised first time on appeal.

- CONSTITUTIONAL OR STATUTORY PROVISIONS -

All provisions of law are either quoted in their entirety in the brief or attached in the addendum if lengthy.

- STATEMENT OF CASE AND STATEMENT OF FACTS -

On or about 9/1/89 Appellant was appointed Alan Jeppeson to represent him in his trial for second degree murder in Tooele County. On or about 9/4/89 Appellant developed a conflict of interest and on 9/20/89 Counsel withdrew from the case. Appellant retained Paul Gotay and proceeded to trial on 2/14/90 Appellant was found guilty of second degree murder. Appellant could not afford to retain Mr. Gotay or otherwise retain any private Counsel for the purposes of appeal.

On 3/12/90 a hearing was conducted and Mr. Gotay withdrew as Counsel. The Court reappointed Mr. Jeppeson, knowing and stating it knew of a conflict but stating that it would review the mater at a later date. This was over Mr. Gotay's objection as well as

the Appellants. The Court never conducted a hearing or made further inquiry into this conflicting situation and ended in Mr. Jeppeson representing the Appellant on his first appeal of right. See Addendum One

On appeal Counsel raised several issues in his "Anders' brief" which if properly raised, would have an arguable basis for reversible error. Counsel's conflict of interest let to a breakdown in his loyalty to his client and this is not only shown the way the brief presented the facts but also by the fact that the contents of this Anders' brief did not purport to the dictates of this court's directive in State-v-Clayton 639 P2d 168 (Utah 1981). This was presented in the Petition in detail.

Appellant then filed the instant Petition pursuant to Utah Rules of Civil Procedure Rule 65B(b) challenging the constitutional deprivations alleged during the pretrial proceedings through his first appeal of right as alleged in the Petition.

Several weeks after filing the Petition, the court appointed Kevin Robson of Bertch & Birch to represent him in his post conviction proceedings.

Shortly thereafter the State filed a motion to dismiss based on the State's newly enacted Statue of Limitations, limiting a Petition of that nature to being filed within one (1) year after the cause of action has accrued with some exceptions. See Addendum Two.

Appellant's Counsel filed a reply to the State's motion to dismiss and a few months later the Court enters as order dismissing the Petition as being frivolous on its face. The District Court erred in dismissing this case without holding an evidentiary hearing because there were questions of fact at issue and whether the Appellant was, in fact, denied effective assistance of Counsel on appeal, whether the Court committed plain

error in re-appointing the Counsel which the Court knew was operating under a conflict of interest, and which the appellant had a conflict of interest with; the Court's failure to inquire into this conflict situation and other errors raised therein.

The Appellant was deprived of his Sixth Amendment right to effective assistance of Counsel which implemented due process under the state and federal constitutions.

- SUMMARY OF ARGUMENT -

The District Court erred in dismissing this Petition without an evidentiary hearing. Appellant raised facts which were supported in the record, facts material to the issue in question which are specific and particularized, not general or conclusory Under Utah's newly enacted Post Conviction Remedies Act, the Statue of Limitations found in §78-35a-107(3) provides that "if the Court finds that the interests of justice require, a Court may excuse a Petitioner's failure to file within the time limitations".

Had the District Court properly reviewed the Petition and kept in mind this Court's, as well as the federal level decisions cited herein, the Court could have easily found that the interest of justice require the waiving of the statue. After all the court appointed Counsel shortly after the Petition was filed.

The Court had to have reviewed the Petition and saw merit justifying appointment of Counsel.

In any event, this Court has said in Earle-v-Warden of Utah State Prison 811 P2d 180 (UT 1991) that a conviction or sentence that has not yet been fully and fairly adjudicated on appeal or in a prior habeas proceeding should not be denied reexamination because of procedural default.

These issues raised herein were not fully and fairly adjudicated on appeal because the Appellant's fourteenth and sixth amendment rights were compromised as stated in his arguments and supported in the record. This is the Appellant's position that the conviction must be reversed or vacated, or in the alternative, the Judgment of the Habeas Court must be reversed and remanded because since the Habeas Court held no hearing (but appointed Counsel) it had no occasion to determine whether the claims involved the constitutional issues raised or substantive issues involving state rules of procedure or discretionary issues. In that event the record before this Court provides no reasonable alternative basis by which to uphold the dismissal of the Petition.

"If the case was, in fact, frivolous, why was the Petition served and Counsel appointed contrary to what §§(b)(7) of Rule 65B directs. But just the opposite occurred which §§(b)(8) directs the method of procedure when the Court determines that all or part of the Petition is not frivolous on its face.

Didn't the Court know of the Statue of Limitations when it served the Petition? Of course it did. Since the State enacted §78-35a-107 et seq, it is apparent then that the Court did, in fact, see that the "interest of justice" would be served by the Petition being served and that the course of procedure directed in Rule 65B(b)(8)-(13) would be the procedural ave for that proceeding to ensue. Anything but that course would be an abuse of discretion".

> Point One: "The Court erred in dismissing the Petition without conducting a hearing. The Court was not in a position to determine the case was frivolous on its face when the attachments to the Petition clearly proved the Appellant to each issue establishing grounds for relief."

The record is unclear as to which provision the Court based its dismissal on; whether it was based on U.R. Civ. Rule 65B(b)(7); or whether on §78-35a-107(3). In any event, review is of a correction of error standard giving no deference to the Trial Court's decision because this decision is based on a question of law. See Addendum One.

If the Court based its claim on 65B(b)(7) and that the issues were already adjusted in a prior appeal, the Appellant has established good cause and exceptional circumstances to revisit these issues by way of the ineffective assistance of Counsel issue raised herein. See Earle supra; Dunn-v-Cook 791 P2d 873, 876 (UT 1990) and Fernandez-v-Cook 783 P2d 584 (UT 1989) stating that ineffective assistance of Counsel claim can properly be raised for the first time via habeas corpus when the allegedly incompetent Counsel handled trial and direct appeal. This case involves a conflict of interest where Counsel was fired before trial but reappointed for direct appeal resulting in his appeal being a sham. See Dunn Id 877, 878; See Hurst-v-Cook 777 P2d 1029, 1035 (UT 1989) (collecting cases on unusual circumstances). This is an issue of first impression.

Further, the conviction has not been fully or fairly adjudicated on appeal. Then Counsel who represented the Appellant on appeal (which had the conflict of interest and which the Appellant had a conflict with) filed an Anders' brief which failed to purport to this Court's dictates outlined in State-v-Clayton 639 P2d 168 (UT 1981) (where this Court adopted Anders-v-California 386 U.S. 738 (1967), constituting a deprivation of due process. See Utah Article 1§7 and the 14th Amendment to the U. S. Constitution. See Earle Id 180, 181, and Dunn supra.

If the Court based its decision on the Statue of Limitations, the Court abused its discretion in not waiving it based on the basis that the interest of justice requires it to do so, if not on stare decisis of this Court's dictates but also on the Tenth Circuit and U. S. Supreme Court decisions establishing support for the Appellant's claims, but further on this Court's directive that ineffective assistance of Counsel is properly brought first time in a habeas proceeding. See Dunn, Fernandez supra. See also Bundy-v-Deland 763 P2d 803 (UT 1988); State-v-Humphries 818 P2d 1027 (UT 1991).

It is comfortable to assume this was the reason for dismissal since this was the issue raised by the State in its Motion to Dismiss. The Court committed plain error in not finding good cause to waive the Statue of Limitations and allowing the Appellant to proceed with his well documented claims. §78-35a-107(3) is a provision which confers authority on the Court to waive that provision when the interests of justice require it to do so. This is such a case which will be seen in Argument Two of this brief.

In Currier-v-Holden P2d (UT Ct. App. 1993) the Appeals Court declared §78-35a-107' predecessor §78-12-31 unconstitutional. The Utah legislature enacted §78-35a-107 with its §§3 because it saw that there will be times when specific constitutional violations will need to be remedied after the statues 1 (one) year tolling period so it allowed that subsection for the Court to determine those times and when the interest of justice require the Court to invoke its judicial authority to remedy some sort of injustice.

When good cause, unusual circumstances or the interest of justice require the Court to do so, and it fails to do so, it commits error, and abuses its discretion.

It is fundamental that a state cannot hold and physically punish an individual except in accordance with due process of law. When such an interest is at stake, an individual has "a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification," Ingraham-v-Wright 430 U.S. 651, 176 (1977). This interest is strong because of the serious sentence being served by the Appellant, a five year to life sentence for murder. Thus he has a right under due process to Petition the Court for relief and this right cannot be barred. The Hurst Court noted that the main purpose of an habeas corpus as a post conviction remedy is to provide a vehicle to collaterally attack a conviction that is so constitutionally flawed that it results in fundamental unfairness, and that the finality doctrine is not so compelling as to be more important than the vindication of one's constitutional rights, Id 1034-35 cited in Dunn Supra at 875-876.

If the Court is not persuaded with the position of the Appellant being that the judgment of the Habeas Court be reversed and remanded with instructions based on the fact it did not have occasion to determine whether the case was frivolous as stated (in the summary of argument section of this brief) and that this Court has no reasonable basis to uphold the District Court's dismissal because there is no record before the Court to provide that basis, then it is the Appellant's position that §78-35a-107 is unconstitutional in violation of Utah Article one Sections Five and Eleven and U. S. Constitution Article 1§9.

This contention was presented to the District Court in the Appellant's response to the State's Motion to Dismiss which the Court apparently determined had no merit.

The basis for this contention is either the statue is unconstitutional because the Petition for Writ of Habeas Corpus or extraordinary relief or post conviction relief by whatever title you choose, is a federally created cause of action or in the alternative §§3 of §78-35a-107 is vague and ambiguous because of its failure to define specific reasons which allow the excusing of the statue.

The writ being akin to a 42 U.S.C. §1983 is the top of discussion but since both are "federally created", the cases and decisions are in context. The U.S. Supreme Court, in Felder-v-Casey 481 US 131 (1988) stated that "states may establish rules of procedure governing litigation in their own courts, by the same token, where states entertain federally created causes of action, the federal right cannot be defeated by local forms of practice." See Brown-v-Western R. Co. of Alabama 338 U.S. 294, 296, (1949) Felder Id at 138.

Now, the Court must keep in mind that the basic difference of a §1983 from a habeas corpus is that the purpose of a habeas is to challenge basically the length of confinement, which is the main difference between the two. Both are methods of attacking violations of civil rights, but a §1983 cannot be used to attack the length of a sentence.

A writ under federal law, 28 U.S.C. §2254 does not have a specified or specific time limit of which to file, as of the filing of the Appellants Petition. (If a time limit has been imposed under federal law, it could not be retro-active in this instance anyway and is unknown.

The Felder Court went on to say that under the supremacy clause (Article 6 Sec.

2) of the Federal Constitution, the relative importance to the State of its own law is not material when there is a conflict with a valid federal law for any state law however clearly within a state's acknowledged power which interferes with or is contrary to federal law, must yield." Free-v-Bland 369 U.S. 663,666 (1962); Felder Id at 138. Such is the case the Appellant has shown flagrant violations of his rights, has filed a Petition, which under Article 1§5 and 11 and Article 1§9 of the U.S. Constitution, he by law should be able to prosecute but the State has erected an impassable barrier for him, a law, contrary to and written in opposition, to the constitution. Further, the Appellant has made claims of factual innocence which, if proven, would entitle him to relief. The record supports his claims explicitly, thus was entitled to an evidentiary hearing, Townsend-v-Sain 372 U.S. 293, 312 (1963) and waiver of the Statue of Limitations under §§3.

Under the "Continuing Wrong" doctrine a Statue of Limitations is a legal impossibility, "each day a gate obstructed free use of their easement, Plaintiffs obtained a new cause of action Shors-v-Branch 720 P2d 239, 243-44 (Mont.1986)"; "where the challenged violation is a continuing one, the staleness concern disappears, Havens Realty Corp.-v-Coleman 455 U.S. 363, 380 (1982)."

Courts have applied the continuing wrong theory in a variety of contexts, particularly where civil rights are at stake, See Havens Realty Corp. Id at 380-81; "under the continuing wrong theory, so long as one discriminatory act falls within limitation time period, even acts occurring outside limitation period are not time barred." (Emphasis added)

This Court said in Becton Dickinson & Co.-v-Reese 668 P2d 1254, 1257 (UT

1983) a cause of action accrues upon the happening of the last event necessary to complete the cause of action. So what we have is "where a continuous chain of events or course of conduct is involved the cause of action accrues at the time of the final act in that series of events or course of conduct," See Barbaccia-v-Co. of Santa Clara 451 F. Supp. 260, 266 (N.D. Cal 1978).

The Appellant has been continually incarcerated since 1989, so the series of events of course of conduct will not cease until he is released, so a Statue of Limitations barring him from filing a Petition is a statue in opposition to the Constitution, contrary to the principles and purposes for the Petition and contrary to the continuing wrong theory and its supporting authority, thus is contrary to the fundamental principles of Article 1§9. §78-35a-107 is unconstitutional and must be declared so. Appellant has established good cause if this issue is considered to be raised first time on appeal.

§78-35a-107 conflicts with Article 1§9 of the U.S. Constitution, Article 1§5 and 11 of Utah's declaration of rights. If two laws conflict with each other, the Courts must decide the operation of each. Article 1§9 and Article 1§5 both guarantee that the privilege of writ of habeas corpus will not be suspended unless in case of rebellion or invasion. The public safety may require it.

Article 1§11, Utah's open courts clause guarantees that no one shall be barred from prosecuting or defending before any tribunal in this State, by himself or Counsel, any civil cause in which he is a party. See the text of each provision Addendum 3. The U.S. Supreme Court discussed this very subject in Marbury-v-Madison 5 U.S. 137; 1 cranch 137, 178 (1803). The Court said that

> "so if a law be in opposition to the Constitution: If both the law and the Constitution apply to a particular case, so the Court must either decide that case conformably to the law, disregarding the Constitution or conformably to the Constitution, disregarding the law: The Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the Courts are to regard the Constitution; and the Constitution is superior to an ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which both apply.
>
> Those then who controvert the principle that the Constitution is to be considered, in Court, as a paramount law, are reduced to the necessity of maintaining that the Courts must close their eyes on the Constitution and see only the law.
>
> This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure".

The Supreme Court concluded that a law repugaant to the Constitution is void and that Courts as well as other departments, are bound by that instrument. So it is clear that placing a time limit or enacting a Statue of Limitations is in direct conflict with the State and Federal Constitutions. Since §78-35a-107 reads as it does, if the cause of action accrues upon the happening of the last event necessary to complete the cause of action as defined in this Court's decision in Becton Dickinson & Co. Id 1257, and since the continuing wrong doctrine is used primarily where civil rights are at stake, Havens Realty

Corp. Id 380-81, then assuming that the Appellant's substantive claims of ineffective assistance of Counsel, conflict of interest and due process under both State and Federal Constitutions are factually true and legally cognizable, Appellant's daily confinement is a continuing wrong because it is based on a convection in violation of his civil rights.

As Judge Orem said in Currier "because the last act necessary to complete a habeas cause of action is illegal confinement and illegal confinement is a continuing wrong, the then three month Statue of Limitation but now the provision is §78-35a-107(2)(e) did not commence at the time a certain affidavit was filed or a particular motion denied, but starts anew each day Petitioner is illegally confined." This applies to the Appellant who has the right to prosecute a Petition, and he was wrongfully denied this right. This issue establishes exceptional circumstances and good cause to raise this issue if considered a first time issue raised on appeal.

§78-35a-107(2)(e) is a refined §78-12-31.1. The difference is largely in that §78-35a-107 allows one year to file, thus in light of what was previously discussed unconstitutional and contrary to the principles of the Constitution and purpose of the writ.

The Plaintiff was wrongfully denied the right to defend his cause guaranteed by Article 1§5 and 11, and Article 1§9 of the federal constitutional guarantee to pursue a writ of habeas corpus, especially in light of the fact that his claims alleged therein were well supported, grounded in fact, and such would entitle him to relief. These claims are explained in detail in Argument Two of this brief.

So since it is clear that §78-351-107(2)(a)-(e) is not constitutionally permissible, then it is impossible to determine when he should have known of the evidentiary facts on

which the Petition is based if a cause of action accrues "upon the happening of the last event necessary to complete the cause of action." The statue defeats itself. If this court defined the phrase "cause of action accrues" correctly in Becton Dickinson & Co. Supra and since the U.S. Supreme Court in Havens Realty Corp. Supra stated that the continuing wrong theory is used primarily when civil rights are at stake, as is in this case, under these theories and ones cited previously, §78-35a-107(2)(a)-(e), especially §§(e), is an invalid legislative enactment because it is unconstitutional under both State and Federal Constitutions and violates Utah's open courts' provision under Article 1§11.

The statue, further because of the above mentioned fact is unconstitutionally vague. Subsections A-d are self defined and are understandable in context to this Court's definition of when a cause of action accrues, but those subsections emphatically cannot apply to the instant action, only §§e' could possibly apply if the Court doesn't declare the statue as a whole unconstitutional.

In light of this Court's definition of when a cause of action occurs and §§e' which states the date on which the Petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the Petition is based, the date could be any date, but since the Court failed to hold a hearing, it was not in a position to determine if there were grounds to excuse the statue based on §3, or whether subsection §§e, one year time span had in fact run out.

"A statue is ambiguous if it can be understood by reasonably well-informed persons to have different meanings, Tanner-v-Phoenix Ins. Co. 779 P2d 231, 233 (UT App. 1990). When a criminal law is NOT sufficiently clear, it is voided by due process

because of their vagueness. U.S.-v-Ullgses-SaLazar 28 F3d 932 (9th Cir 1994).

Therefore since the Court failed to conduct a hearing as mentioned above, the fact that the statue is vague and ambiguous. "Any ambiguity that may exist . . . . should be resolved in favor of a criminal defendant", Smith-v-Cook 803 P2d 788, 791 (UT 1990).

Since the Appellant has raised two issues involving the constitutionality of the statue, "strict scrutiny" must be applied to determine the constitutionality of a statue which burdens the exercise of a fundamental right, US-v-Johnson 40 F3d 436 (D.C.Cir 1994).

Appellant requests that this Court conduct a comprehensive review of this claim since, to his knowledge, no known case law or guidance of this newly enacted statue exists for him or the lower courts to review.

- ARGUMENT TWO -

> "The District Court erred in not letting the Appellant proceed with his ineffective assistance of Counsel and conflict of interest claims on his Appellant Counsel when this issue established "good cause" and "unusual circumstances" to rehash some issues raised on appeal and factually supported the request for relief on the grounds of plain error."

A District Court has an affirmative duty to initiate an inquiry into a conflict of interest situation if it knows or reasonably should know that a potential conflict exists. When the Trial Court has notice of a potential conflict but fails to make such an inquiry, the reviewing Court will presume a violation of the Sixth Amendment right to Counsel. See U.S.-v- Cook 45 F3d 388, 393-94 (10th Cir 1994); Holloway-v-Arkansas 435 U.S. 475, 484-85 (1978).

In the instant case Appellant's Counsel, Alan Jeppeson, withdrew from his case on or about 9/20/89 because of a conflict of interest. After an unsuccessful trial with retained Counsel, the Appellant became indigent and could not afford to hire Counsel or keep his retained Counsel for the purpose of appeal. Appellant's retained Counsel withdrew and the Court appointed Mr. Jeppeson again for the purpose of appeal and knowing a conflict existed. An objection was entered and the Court stated that it would review the matter at a later date but never did. This failure of the Court constitutes plain error.

Appellant proceeded with his first appeal of right with his Counsel who was operating under conflict of interest. A Sixth Amendment claim grounded on conflict of interest, like that in this case, should be analyzed in the same fashion as a Sixth Amendment claim of ineffective assistance of Trial Counsel. Euitts-v-Lucey 469 U.S. 396 (1985).

Further the prevailing professional and ethical standards are applicable to this case. Rule 1.7(b), Utah Rules of Professional Conduct, states in relevant part: "A lawyer shall not represent a client if the representation of that client may be materially limited by . . . . the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) each client consents after consultation." In this case the lawyer's representation was adversely affected and the Appellant didn't consent to the representation. He objected.

A. The predominate point raised as reversible error in the Petition was the Trial Court's duty to inquire into a conflict situation, since it knew of the conflict situation

even before it re-appointed Counsel again to the case for the first appeal of right, after, also a timely objection on the issue.

At the point the risk of conflict of interest is brought to the Trial Court's attention, "the Court has the responsibility to investigate further, to advise the defendant personally, and to receive a knowing waiver if that is the express wish of the defendant." See U.S.-v-Tatum 943 F2d 370, 379 (4th Cir 1991). There was no waiver on the part of the Appellant to proceed with Counsel, only an objection. It was the Appellant who fired him shortly after he was appointed. "upon the Trial Court rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . ." Holloway at 484 quoting Glasser-v-U.S. 315 U.S. 60, 71 (1942).

In Wood-v-Georgia 450 U.S. 261 (1981), the U.S. Supreme Court held that a conflict situation which is not addressed by the Trial Court requires reversal: "Sullivan mandates a reversal when the Trial Court has failed to make an inquiry even though it "knows , or reasonably should know, a particular conflict exists." Id at 272 n.18 (quoting Cuyler-v-Sullivan 446 U.S. 347.

Similarly, when a conflict situation becomes apparent to the State, "it has a duty to bring the issue to the Court's attention and, if necessary, move for disqualification of Counsel." Tatum 943 F2d at 379-80 cf. U.S.-v-Agurs 427 U.S. 97, 110-11 (1976).

This conflict situation was arguably raised to the Trial Court. This conflict situation was raised to the Habeas Court in the Petition, supported by documentation and the Habeas Court must have seen merit because it appointed Counsel. See Petition Addendum 4.

Notwithstanding the foregoing, the failure of the Trial Court to address the circumstances of the conflict issue requires reversal in as much as the Trial Court knew or reasonably should have known of the particular conflict of interest between the Appellant and Counsel. Further the Habeas Court abused its discretion in declining to hear the issue and failing to have an evidentiary hearing on these questions of fact adequately and arguably supported in the record, and because good cause and exceptional circumstances are present to warrant review as well as plain error. Further the State failed in its duty, whether it be the County Prosecutors of the State Attorney General's office which served the same documents as the Habeas Court, to bring this well documented conflict of interest situation to the Court. This constitutes plain error.

It is the Appellant's position that the Trial Court committed plain error as discussed above and that the Habeas Court committed plain error by failing in its duty to protect the inalienable rights of the Appellant because it was in the position to remedy the Sixth Amendment violation and the due process violation by either vacating the conviction and ordering a new trial; entering a Nunc Protunc Judgment so Appellant could appeal; or any other relief it deemed appropriate. See Hammershoy-v-Commonwealth 398 S.W 2d 883 (1966); U.S.-v-Winterhalder 724 Fed 109 (10th Cir 1983)(per curiam (discussing remedies).

B. The Utah Court of Appeals in affirming Appellant's conviction when his attorney, who he had a conflict of interest with, filed a Anders' brief which failed to purport to this Court's construction requirements, done so violating the Appellant's rights to due process under the Fourteenth Amendment. See Euitts-v-Lucey 469 U.S. 385-401

(1985). The Habeas Court was also in a position to correct this and failed in its judicial duty, which the interest of justice required this issue as well as the one stated above, to be vindicated, thus abusing its discretion in dismissing the Petition. This brief was filed against Brown's desires.

The Anders' brief raised several individualized issues but did not have a particularized argument for each issue nor has law cited for each issue. See U.R.A.P. Rule 24(a)(9).

No argument was articulated which demonstrated that each issue was in fact frivolous. Dunn Id 878. But instead, there was one large statement of fact or summary of argument that failed to particularize any one argument. Nor were there legal citations cited for each particular issue raised. There was no analysis of the record or case law for a Court to secure in belief that the issues were in fact frivolous. See Dunn Id 878. But instead, Counsel briefed the case in favor of the government. Appellant was deprived of effective assistance of appellate Counsel.

In Robinson-v-Black 812 F2d 1084, 1086-87 (8th Cir 1987). The Court said that;

> "Counsel did not act as an advocate for Robinson when he briefed all issues in favor of the government and concluded Robinson's claims were meritless. Robinson had a right to expect Counsel to brief and argue his case to the best of Counsel's ability, showing the most favorable side of defendant's arguments. Counsel changed the adversial process into an inquisitorial one by joining the forces of the State and working against his client."

It is not enough to list issues and case citations; the arguments must be sufficiently articulated to justify the conclusion that Counsel has truly sought to present

meritorious issues but cannot. Penson-v-Ohio 488 U.S. 75 (1988) cited in Dunn Id 877.

So the Anders' brief filed in Brown's case, like Dunn's, violates the, Penson and Clayton requirements in at least two ways, and the conclusion must be the same, that Brown was denied effective assistance of Counsel. A prior appeal is not a bar to the Habeas proceedings and that the case must be remanded as it was in Dunn for proceedings on the merits of the Petition.

So because of the conflict of interest, Jeppeson should have never been re-appointed. The conflict began when Jeppeson came to Brown shortly after he was appointed wanting to know if he would take a plea bargain. Brown said "No". Jeppeson threatened to withdraw stating he believed Brown was guilty and that he would be found guilty at trial. Brown fired Counsel. This scenario is in contrast with the scenario in U.S.-v-Wilson 922 F2d 1336 (7th Cir 1991) and the principles that that case was established on. See Brief Addendum 5.

Further, Counsel who operates under the belief that his client should be convicted, fails to function in any meaningful sense as the government adversary, Osborn-v-Shillinger 861 F2d 612, 625 (10th Cir 1988)(quoting U.S.-v-Cronic 466 U.S. 666 (1984)). The whole fact of Jeppeson's re-appointment was highly prejudicial to Brown violating his Sixth Amendment right to effective assistance of Appellate's Counsel and to have representation free from conflict and this type of conflict representation derives from the Sixth Amendment as applied to the states by the due process clause of the 14th Amendment, Garcua-v-Bunnell 33 F3d 1193 (9th Cir 1994). This establishes good cause and exceptional circumstances for review and supports the plain error claim made earlier

in this brief.

Counsel is obligated to meticulously review the record in any case in which he challenges a District Court's disposition, Hirsch-v-Burke 40 F3d 900 (7th Cir 1994); Battle-v-Delo 19 F3d 1547 (8th Cir 1994).

The Anders' brief was filed against Brown's wishes. He knew he had several claims which would support a conclusion of reversible error. The two strongest being a lack of evidence to support the conviction who was admitted by the State in the State's interlocutory appeal to this Court and even if the evidence was sufficient, it could only support a manslaughter conviction based on the heat of passion theory or emotional disturbance theory since the victim of the crime was Brown's wife. These were strongly arguable issues.

There is several other issues such as search and seizure, police brutality, Trial Court errors in failing to grant a new trial and issues pertaining to the jury that were arguable also.

But because of Counsel's conflict, he failed to meticulously review the record, failed to articulate argument to demonstrate each one frivolous, or objectively demonstrate each one frivolous, failed to analyze the record and legal citations to the point where the Court could be properly assured that Counsel engaged in sufficient analysis of the record and case law to secure in belief that the issues are frivolous. And Counsel should have addressed the issues raised herein to the extent that they were arguable. The Sixth Amendment requires automatic reversal when a Trial Court fails to conduct an inquiry after . . . . a timely objection, U.S.-v-Burney 756 F2d 787, 791 (10th

merits of th on the e Petition.

- CONCLUSION -

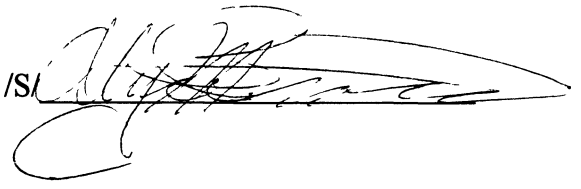
It is the Appellant's position that this case should be reversed and remanded for proceedings on the merits of the Petition, that §78-35a-107 et seq should be declared unconstitutional or because of the conflict of interest shown in the record, that he be granted an outright reversal, or be granted a Nunc Pro Tunc Judgment so that he may file a new motion for new trial to raise trial errors and have a First Appeal of Right properly filed or any relief this Court deems just and proper in this case.

DATED this 13 day of January, 1997.

/S/ _____
Appellant Pro Se'

CERTIFICATE OF SERVICE

I certify that I have mailed a copy of the foregoing, postage prepaid, to the party listed below on this 13th day of January 1997.

/S/ 

Utah Attorney General's Office
Appeals Division
236 State Capitol
Salt Lake City, Utah 84114

ADDENDUM I

ALAN K. JEPPESEN
Attorney for Plaintiff
85 North Main Street
Tooele, Utah 84074
Telephone: (801) 882-2444

FILED
1989 OCT -5 PM 12:43

IN THE THIRD CIRCUIT COURT, TOOELE CITY DEPARTMENT

TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. DOTY LYN BROWN, aka Jack Brown, Defendant.	**NOTICE OF WITHDRAWAL OF COUNSEL** Civil No. 895000318

Notice is hereby given that Alan K. Jeppesen does withdraw as counsel for Defendant,

Dated this 20 day of September, 1989.

Alan K. Jeppesen
Attorney at Law

CERTIFICATE OF MAILING

I hereby certify that on the 20th day of September, 1989, I mailed, postage prepaid, a true and correct copy of the foregoing Notice of Withdrawal of Counsel to Ronald L. Elton, Tooele County Attorney, 47 South Main Street, Tooele, Utah 84074 and Paul Gotay, 11583 South 200 East, Salt Lake City, Utah 84111.

6

IN THE THIRD DISTRICT COURT

TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH	:	CASE NUMBER 891300077 FS
PLAINTIFF,	:	DATE MARCH 12, 1990
vs	:	JUDGE RAYMOND S. UNO
	:	COURT REPORTER WILSON, CECILEE
BROWN, DOTY LYN	:	COURT CLERK RGB
DEFENDANT.	:	ATP ELTON, RONALD PRESENT
		ATD GOTAY, PAUL PRESENT

THIS MATTER COMES NOW BEFORE THE COURT FOR SENTENCING AND FOR HEARING DEFENDANTS MOTION TO ARREST VERDICT. MR. GOTAY MAKES STATEMENTS IN BEHALF OF THE DEFENDANT IN REGARDS TO THE PRE-SENTENCE REPORT AND THE WORDING OF THE SAME. MR. ELTON RESPONDS COURT NOW BEING ADVISED IN THE PREMISES SENTENCES THE DEFENDANT AS FOLLOWS: 5-YRS TO LIFE IN THE UTAH STATE PRISON SUCH SENTENCE TO RUN CONCURRENT WITH ANY OTHER SENTENCE-$5000.00 FINE +25% SURCHARGE RESTITUTION TO VICTIMS FAMILY FOR BURIAL. COURT NOW HEARS ARGUMENTS REGARDING DEFENDANTS MOTION TO ARREST JUDGMENT,MOTION FOR A NEW TRIAL-COURT DENIES BOTH MOTIONS.

MR. GOTAY INDICATES TO THE COURT THAT A WITHDRAWAL OF COUNSEL IS FILED WITH THE COURT AND THAT A PUBLIC DEFENDER BE APPOINTED THE DEFENDANT. COURT NOW FINDS THAT THE DEFENDANT IS INDIGENT AND THAT THE PRESENT COUNSEL, GOTAY HAS FILED A NOTICE OF APPEAL. ALAN K. JEPPESEN HAS BEEN APPOINTED COUNSEL FOR THE PRESENT AND FURTHER ACTION ON APPOINTMENT OF OTHER COUNSEL MAY BE CONSIDERED ON MOTION OF THE DEFENDANT.

6

Paul Gotay (1224)
Gotay Law Office
Attorney for Defendant
5085 South State Street
Murray, Utah 84107
Telephone: 801-265-2833

CLERK OF THE COURT
1990 MAR 12 AM 11:18
3RD DISTRICT COURT

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. DOTY LYN BROWN Defendant.	NOTICE OF WITHDRAWAL Case No. Judge Raymond S. Uno

Comes now, Paul Gotay, attorney for the defendant, DOTY LYN BROWN, and withdraws from representing said defendant.

DATED this 12 day of March, 1990.

PAUL GOTAY
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 12 day of March, 1990, I ~~mailed~~ hand delivered a true and correct copy, postage prepaid, of the foregoing Notice of Withdrawal to Ronald Elton, Tooele County Attorney, Tooele County Courthouse, 47 South Main Street, Tooele, Utah 84074.

PAUL GOTAY
Attorney at Law

000221

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

March 21, 1990

OFFICE OF THE CLERK

SHARON CALLISTER
CLERK OF THE COURT
47 SOUTH MAIN
TOOELE, UTAH 84074

The State of Utah,
Plaintiff and Appellee,
v.
Doty Lyn Brown,
Defendant and Appellant.

No. 900127
891300077

This day Notice of Appeal filed.

Geoffrey J. Butler, Clerk

ADDENDUM II

Enrolled Copy S.B. 30

Corrected Version

POSTCONVICTION STATUTE OF LIMITATIONS

1995 GENERAL SESSION

STATE OF UTAH

Sponsor: Robert C. Steiner

AN ACT RELATING TO JUDICIAL CODE; REPEALING AND REENACTING PROVISIONS ON THE POSTCONVICTION RELIEF STATUTE OF LIMITATIONS.

This act affects sections of Utah Code Annotated 1953 as follows:

REPEALS AND REENACTS:

78-12-31.1, as enacted by Chapter 133, Laws of Utah 1979

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-12-31.1** is repealed and reenacted to read:

78-12-31.1. Postconviction relief statute of limitations.

(1) A petitioner is entitled to relief pursuant to Rule 65B(b), Utah Rules of Civil Procedure, only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action in a petition for postconviction relief pursuant to Rule 65B(b), Utah Rules of Civil Procedure, accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable

diligence, of evidentiary facts on which the petition is based.

(3) These time limitations do not apply to a petitioner's claims:

(a) that his sentence has expired; or

(b) that the committing court acted outside of its jurisdiction when it entered the conviction.

(4) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(5) This section does not apply to motions to correct a sentence pursuant to Rule 22, Utah Rules of Criminal Procedure.

ADDENDUM IIII

CONSTITUTION OF UTAH

PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION. 1896

ARTICLE I

DECLARATION OF RIGHTS

Section 1. [Inherent and inalienable rights.]
All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right. 1896

Sec. 2. [All political power inherent in the people.]
All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require. 1896

Sec. 3. [Utah inseparable from the Union.]
The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land. 1896

Sec. 4. [Religious liberty — No property qualification to vote or hold office.]
The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution. 1896

Sec. 5. [Habeas corpus.]
The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it. 1896

Sec. 6. [Right to bear arms.]
The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. 1985

Sec. 7. [Due process of law.]
No person shall be deprived of life, liberty or property, without due process of law. 1896

Sec. 8. [Offenses bailable.]
(1) All persons charged with a crime shall be bailable except:

(a) persons charged with a capital offense when there is substantial evidence to support the charge; or

(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or

(c) persons charged with a crime, as defined by statute, when there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to self or any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law 1989

Sec. 9. [Excessive bail and fines — Cruel punishments.]

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor. 1896

Sec. 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded. 1896

Sec. 11. [Courts open — Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. 1896

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense. 1896

Sec. 13. [Prosecution by information or indictment — Grand jury.]

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature. 1949

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized. 1896

Sec. 15. [Freedom of speech and of the press — Libel.]

No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. 1896

Sec. 16. [No imprisonment for debt — Exception.]

There shall be no imprisonment for debt except in cases of absconding debtors. 1896

Sec. 17. [Elections to be free — Soldiers voting.]

All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law. 1896

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed. 1896

Sec. 19. [Treason defined — Proof.]

Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act. 1896

Sec. 20. [Military subordinate to the civil power.]

The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner; nor in time of war except in a manner to be prescribed by law. 1896

Sec. 21. [Slavery forbidden.]

Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State. 1896

Sec. 22. [Private property for public use.]

Private property shall not be taken or damaged for public use without just compensation. 1896

Sec. 23. [Irrevocable franchises forbidden.]

No law shall be passed granting irrevocably any franchise, privilege or immunity. 1896

Records and Proceedings shall be proved, and the Effect thereof.

Sec. 2. [Privileges and immunities — Fugitives from justice and service.]

[1.] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2.] A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3.] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Sec. 3. [Admission of states — Rules and regulations respecting the territory and property of the United States.]

[1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2.] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Sec. 4. [Guaranty of republican form of government and against invasion.]

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

[AMENDMENT]

[Mode of amendment.]

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

[MISCELLANEOUS PROVISIONS]

[Assumption of public debt — Supreme Law — Oath of office — Religious tests prohibited.]

[1.] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a qualification to any Office or public Trust under the United States.

ARTICLE VII

[ADOPTION]

[Ratification — Attestation.]

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same. Done in Convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven, and of the independence of the United States of America the twelfth.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENTS I-X [BILL OF RIGHTS]
AMENDMENTS XI-XXVI

AMENDMENT I

[Religious and political freedom.]
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

[Right to bear arms.]
A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

[Quartering soldiers.]
No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

[Unreasonable searches and seizures.]
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

[Trial. by jury in civil cases.]
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

[Rights retained by people.]
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

[Powers reserved to states or people.]
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

[Suits against states — Restriction of judicial power.]
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

[Election of President and Vice-President.]
The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three

on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII

Section
1. [Slavery prohibited.]
2. [Power to enforce amendment.]

Section 1. [Slavery prohibited.]
Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sec. 2. [Power to enforce amendment.]
Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV

Section
1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]
4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

Section 1. [Citizenship — Due process of law — Equal protection.]
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]
No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV

Section
1. [Right of citizens to vote — Race or color not to disqualify.]
2. [Power to enforce amendment.]

Section 1. [Right of citizens to vote — Race or color not to disqualify.]
The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Sec. 2. [Power to enforce amendment.]
The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI

[Income tax.]
The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

The procedures in this rule shall govern proceedings on all petitions for extraordinary relief. To the extent that this rule does not provide special procedures, proceedings on petitions for extraordinary relief shall be governed by the procedures set forth elsewhere in these rules.

(b) **Wrongful imprisonment.**

(1) **Scope.** Any person committed by a court to imprisonment in a state prison, other correctional facility or county jail who asserts that the commitment resulted from a substantial denial of rights may petition the court for relief under this paragraph. This paragraph (b) shall govern proceedings based on claims relating to original commitments and commitments for violation of probation or parole. This paragraph (b) shall not govern proceedings based on claims relating to the terms or conditions of confinement.

(2) **Commencement.** Except for challenges to parole violation proceedings, the proceeding shall be commenced by filing a petition, together with a copy thereof, with the clerk of the district court in the county in which the commitment leading to confinement was issued. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses. Petitions challenging parole violation proceedings shall be commenced by filing a petition together with a copy thereof, with the clerk of the district court in the county in which the petitioner is located.

(3) **Contents of the petition.** The petition shall set forth all claims that the petitioner has in relation to the legality of the commitment. Additional claims relating to the legality of the commitment may not be raised in subsequent proceedings except for good cause shown. The petition shall state:

(A) the place where the petitioner is restrained;

(B) the name of the court by which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(C) in plain and concise terms, all of the facts on the basis of which the petitioner claims a substantial violation of rights as the result of the commitment;

(D) whether or not the judgment of conviction or the commitment for violation of probation or parole has been reviewed on appeal, and, if so, the number and caption or title of the appellate proceeding and the results of the review;

(E) whether the legality of the commitment has already been adjudicated in any prior post-conviction or other civil proceeding, and if so the reasons for the denial of relief in the prior proceeding.

(4) **Attachments to the petition.** The petitioner shall attach to the petition affidavits, copies of records or other evidence available to the petitioner in support of the allegations. The petitioner shall also attach to the petition a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the commitment, and a copy of all orders and memoranda of the court. If copies of pertinent pleadings, orders, and memoranda are not attached, the petition shall state why they are not attached.

(5) **Memorandum of authorities.** The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(6) **Assignment by the presiding judge.** On the filing of the petition, the clerk shall promptly deliver it to the assigned judge of the court in which it is filed. Except for challenges to parole violation proceedings, the presiding judge shall if possible assign the proceeding to the judge who issued the commitment.

(7) **Dismissal of frivolous claims.** On review of the petition, if it is apparent to the court that the issues presented in the petition have already been adjudicated in a prior proceeding, or if for any other reason any claim in the petition shall appear frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(8) **Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition is not frivolous on its face, the court shall designate the portions of the petition that are not frivolous and direct the clerk to serve a copy of the petition and a copy of any memorandum by mail upon the attorney general and the county attorney.

(9) **Responsive pleading.** Within twenty days (plus time allowed under these rules for service by mail) after service of a copy of the petition upon the attorney general and county attorney, or within such other period of time as the court may allow, the attorney general or county attorney shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within twenty days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(10) **Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. Upon motion for good cause, the court may grant leave to either party to take discovery or to extend the date for the hearing. Prior to the hearing, the court may order either the petitioner or the state or county to obtain any relevant transcript or court records. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding.

(11) **Orders.** If the court rules in favor of the petitioner, it shall enter an appropriate order with respect to the validity of the challenged commitment and with respect to rearraignment, retrial, resentencing, custody, bail or discharge. The court shall enter findings of fact and conclusions of law, as appropriate, following any evidentiary hearing or any hearing on a dispositive motion. Upon application of the attorney general or the county attorney, or upon its own motion, the court may stay release of the petitioner pending appeal of its order.

(12) **Costs.** The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is unable to pay the costs of the proceeding, the petitioner may proceed upon an affidavit of impecuniosity, in which event the court may direct that the costs be paid by the county in which the complainant was originally charged.

(13) **Appeal.** Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

(c) **Other wrongful restraints on personal liberty.**

(1) **Scope.** Except for instances governed by paragraph (b) of this rule, this paragraph (c) shall govern all petitions claiming that a person has

ADDENDUM IV

3rd

RONALD L. ELTON
Tooele County Attorney
Tooele County Courthouse
47 South Main Street
Tooele, Utah 84074
Telephone: (801) 882-5550, Ext. 351

~~IN THE THIRD JUDICIAL DISTRICT COURT~~
IN the Supreme Court of the State of Utah
~~IN AND FOR TOOELE COUNTY, STATE OF UTAH~~

* * * * * * * *

THE STATE OF UTAH,	)	
	)	**PETITION FOR PERMISSION TO**
Plaintiff,	)	**FILE INTERLOCUTORY APPEAL**
	)	
Vs.	)	
	)	
DOTY LYN BROWN,	)	
	)	**Case No. 891300077**
Defendant.	)	

* * * * * * * *

Pursuant to Utah Code Annotated, § 78-2-2(3)(h), which gives the Utah Supreme Court jurisdiction over interlocutory appeals from any court of record involving a charge of a First degree felony; and pursuant to Utah Code Annotated, § 77-35-26(3)(e) which allows an appeal from an order of a court granting a pretrial motion to suppress evidence; and pursuant to Rule 5 of the Utah Supreme Court governing discretionary appeals from interlocutory orders, the State of Utah hereby petitions the Supreme Court for permission to appeal from the Interlocutory Order dated February 12, 1990, and signed by the Honorable Raymond S. Uno a copy of which Order is included herewith. Petitioner alleges as follows:

1. That on or about December 7, 1989, the preliminary hearing was held in the above-named matter in which the Defendant was bound over to the Third District Court for

trial on charges of Second Degree Murder, a First Degree Felony. That upon hearing the testimony offered at the preliminary hearing, the attorneys for the State of Utah determined that the State needed an additional firearms identification witness for use at trial.

2. That the State submitted the physical evidence to Mr. John O'Neil, an employee of the Federal Alcohol, Tobacco, and Firearms agency for firearms identification analysis.

3. That on January 17, 1990, counsel for the State submitted a list of potential witnesses to be used at trial to attorney for the defendant, Paul Gotay, and that the name John O'Neil was included in the list of potential witnesses.

4. That counsel for the State orally communicated to Mr. Gotay that the State was having the firearms evidence analyzed by an additional witness and that results of the analysis would be provided to defense counsel as soon as they were received by the State.

5. That on or about February 2, 1990, Mr. O'Neil communicated to the State by telephone the result of his analysis indicating that all three bullet fragments which were submitted were positively identified as having been fired from the murder weapon.

6. That on that same date, counsel for the State, John K. West, telephoned Mr. Paul Gotay and orally gave him the results communicated by Mr. O'Neil.

7. That on the afternoon of February 8, 1990, counsel for the State received in the mail the one-page report prepared by Mr. O'Neil summarizing his analysis that on February 9, 1990, and that the State mailed, with a letter, a copy of that report to Mr. Gotay, attorney for defendant. That on February 12, 1990, the State received in the mail, photographs prepared by Mr. O'Neil depicting some of his observation in comparing the bullet fragments.

8. That in every instance, the State of Utah provided to Mr. Gotay any new information received from Mr. O'Neil as soon as practicable after its receipt.

9. Counsel for Defendant filed a Motion to Exclude the Testimony of Mr. John O'Neil and the District Court, the Honorable Raymond S. Uno presiding, granted Defendant's Motion on February 12, 1990. That the State urged the court that the appropriate remedy for any potential prejudice to the Defendant would be to continue the trial rather than to exclude the testimony.

10. The question of law upon which this court must rule is whether the Defendant was unfairly prejudiced by not having received written reports of Mr. O'Neil's analysis at an earlier date and if so, whether the proper remedy for the late receipt of the written report was suppression of the testimony of Mr. O'Neil or a continuance of the trial date.

11. An immediate Interlocutory Appeal should be permitted because the matter is set for jury trial to begin February 13, 1990, and the State deems the testimony of Mr. O'Neil essential to successful prosecution of the Defendant. The State's entire case is based upon firearms identification and fingerprint evidence. No direct evidence of the murder will be introduced at trial. Accordingly, the firearms identification evidence is critical to successful prosecution of the State's laws.

12. The interest of justice and the search for truth require that this essential evidence be given to the trier of fact.

Accordingly, the State respectfully requests that this petition be granted in an expedited hearing.

DATED this 12th day of February, 1990.

RONALD L. ELTON
Tooele County Attorney

JOHN K. WEST
Deputy Tooele County Attorney

CERTIFICATE OF HAND DELIVERY

I certify that I mailed a true and correct copy of the foregoing Petition for Permission to File Interlocutory Appeal, Motion for Stay and Order will be hand delivered to Paul Gotay, at the Tooele County Courthouse on the 13th day of February, 1990.

Doty Brown
#19942
P.O. Box 250
Draper, Utah 84020

In The Supreme Court of The State of Utah

Doty Brown Petitioner -v- State of Utah Respondent	No., _____

Petition For Extra Ordinary Relief
(Pursuant to U.R.A. P. Rule 19)

Doty Brown
#19942 OQ II
P.O. Box 250
Draper, Utah 84020

Jan Graham
Utah Attorney General
236 State Capitol
Salt lake City, utah 84114

Table of Contents

Issue 1: Has the 6th amendment and the State and Federal due process clauses been violated by the district court knowingly reappointing counsel to the petitioners case with which petitioner had an actual conflict of interest with and by the court committing plain error in appointing counsel to perfect the first appeal of right which because of the conflict, led to the filing of an Anders brief.

Issue 2: Has the State and Federal due process as well as the sixth amendment been violated by counsels deficient performance which led ultimately to petitioner being constructively denied a meaningful first appeal of right and by the Anders/Clayton proceeding not purporting to the requirements mandated for this type of proceeding by this court?

Issue 3: Was due process of the State and Federal Constitutions denied by the Court of Appeals failing to conduct a comprehensive review of the record to decide if it was in fact frivolous?

- Authority -

Doty Brown
#19942
P.O. Box 250
Draper, Utah 84020

In The Supreme Court of The State of Utah

Doty Brown Petitioner -v- State of Utah Respondent	No., _____

Petition For Extra Ordinary Relief
(Pursuant to U.R.A. P. Rule 19)

Pursuant to rule 19 of the Utah Rules of Appellate Procedure, Petitioner hereby files an application for Writ of Mandamus against the above named respondents. In compliance with rule 19(b) the following information is offered;

- Statement of Interested Parties -

This petition directly involves the rights of petitioner Doty Lyn Brown, as an inmate of the Utah State Prison. Portions of the relief sought may substantially affect the conduct of district courts, prosecutors, defense counsel as well as inmates presently incarcerated and the future incarceration of inmates.

Statement of Issues and Relief Sought

The issues in the case are as follows

1. Has the Sixth Amendment and State and Federal due process clauses been violated by the district court knowingly reappointing counsel to petitioners case with which petitioner had an actual conflict of interest with and by the court committing plain error in appointing counsel to perfect the first appeal of right which, because of the conflict led to counsel filing an Anders Brief?
2. Has state and Federal due process as well as the Sixth Amendment been violated by counsels deficient performance which led ultimately to the petitioner being constructively denied a meaningful first appeal of right and by the Anders/Clayton proceeding not purporting to the requirements mandated for this type of proceeding by this court?
3. Was due process of the State and Federal Constitutions violated by the Court of Appeals failing to conduct a comprehensive review of the record to decide if it was in fact frivolous?

This petitioner respectfully request that this court require the District Court to enter a judgement Nunc Pro Tunc that the petitioner may have an effective first appeal of right or for this court to vacate the judgement and remand the matter to the district court to enter a new one where upon an appeal may be taken from the new judgement. The petitioner has a right to constitutionally purported proceedings and this right by no means may be compromised.

- Statement of Facts -

On, August, 1989 Petitioner was arrested for suspicion of second degree murder, before questioning petitioner was taken into a small room at the Salt Lake COunty jail. There he was questioned by sergeant James and Bradshaw of the Tooele County Sheriff's Office regarding the death of his wife, Sandra Brown, sergeant James and Bradshaw before repeatedly beating the petitioner while he was handcuffed behind his back, failed to read him his miranda rights. Petitioner between beatings, told officers several times that he wanted an attorney present before questioning.

Out of fear, petitioner told officers what he knew about his wife's death although the confession was involuntary. Petitioner was then arrested and charged with second degree murder, a violation of U.C. A. 76-5-203 (see exhibit 1)(Affidavit of Defendant.)

At the arraignment, Allen K. Jeppson was appointed to represent the petitioner, this date is unknown. A conflict of interest severed the attorney/client relationship when petitioner was told by Mr. Jeppson, from the beginning to take a plea bargain and this was done before any preliminary investigation of the case. On Sept 1989, petitioner was able, through the help of family, to retain Paul Gotay as counsel, on September 20, 1989 counsel Jeppson notified Mr. Gotay and the County Attorney of his withdrawal as council, and filed the same in the Third District Court on October 5, 1989, (see exhibit 2).

On December 7, 1989 a preliminary hearing was and the matter was bound over to the District Court. Many issues were raised during the course of the proceeding such as miranda issues and the motion to suppress that was granted but the court allowed it to be withdrawn after it was granted, thus committing plain error. Points further argued were lack of the lack of direct evidence. No evidence which directly implemented the petitioner the petitioner was ever introduced and this lack of direct evidence was admitted to by the State. (see exhibit 3 states request for interlocutory appeal at 3.). * This necessarily affects the nature of the crime the petitioner was charged with because the statutory elements of the offense were not proven at preliminary hearing nor during trial and legally could not be. If there is no direct evidence, no intent can be proven.

During the trial several female jurors were in the restroom and a spectator, Mrs Walker questioned the petitioners mother about the petitioner, in front of other lady jurors. Although the jury was interrogated, the court committed manifested error in not declaring a mistrial based on inproprity of the jury, and impanelled a new jury to hear the case.

On February 17, 1990, petitioner was found guilty of second degree murder. (see exhibit 4 .). On or about February27, 1990, the counsel of the petitioner filed a motion of arrest of judgement/or new trial alleging lack of evidence to support a conviction of second degree murder. It was councils

contention (which is supported in the record) that the court errored in denying the motion to dismiss or in the alternative reduce the charge to manslaughter because the state by their own admission, failed to establish necessary proof of intent, which is an element of second degree murder. (see exhibit 5).

On March 12 or 20, 1990, the court reappointed Alan K. Jeppson, again to the petitioner, knowing of a prior conflict of interest. See exhibit 5. The court indicated on its minute entry "Mr. Gotay indicates to the court that a withdrawal of counsel is filed with the court and that a public a public defender be appointed the defendant. Court now finds that the defendant is indigent and that present counsel, Gotay has filed a notice of appeal. Alan K. Jeppson has been appointed counsel for the present and future action on appointment of other counsel may be considered on motion of the defendant."

The court knew that a conflict existed and errored in its appointment of Mr. Jeppson back to the case and leaving the responsibility of filing a motion for new counsel on the defendant or counsel at time that first appeal of right, a crucial and critical proceeding was about to proceed. The trial court committed plain error and exhibited wanton indifference to the rights of the petitioner.

Needless to say when examining exhibit6, Mr. Jeppson continued to represent petitioner over objection by Mr Gotay,a nd petitioner which indicated to the court that a conflict existed, when the court reappointed Mr. Jeppson

Further the trial court failed to inquire into this matter which several Federal Circuits as well as the U.S. Supreme Court has said is automatic reversal if conflict is proven.
Conflict is proven in the record and it is proven the court had knowledge. The petitioner has a constitutional right under the sixth and 14th amendment to a fair trial and representation of competent counsel, and his proceedings failed to purport to what due process demands. Where, in this case, there are several issues where the court has refused to take some action that it is required to do, mandamus will lie for connection of the rights that were unjustly deprived.

Mr. Jeppson failed to keep his client adequately informed and failed to discuss his inent to file a Anders Brief.

He violated the rules of professional conduct. He further failed to comply with this courts outline of what an Anders brief is to consist of. He further never discussed the issues being raised because had he communicated with the petitioner, the petitioner would have insisted on a conflict of interest argument about his reappointment. This would have necessarily challenged his competency. Council knew he was operating under conflict and this is evident by the quality of the appellant brief had prepared, versus the genuine issues of fact which existed.

In councils failure to comply with the acceptable form of an Anders brief set forth by this court, he effectively denied the petitioner of a meaningful first appeal of right. He failed to raise several non frivolous issues such as failure of the state to prove intent, why the case wasn't reduced to manslaughter by the states admitted statement of lack of direct evidence, and his reappointment to a client that had conflict with him. FIrst, counsel failed to articulated arguments for each point counsel did raise in the statement of issues and then objectively demonstrate how each argument or issue was in fact frivolous. Second, each issue failed to contain references to the record. The issues were not analyzed and appropriate record and legal citations given in each instance. Counsel did not engage in sufficient analysis of then record and case law to secure in belief that each issue was frivolous.

Third counsel failed to raise arguable points, namely the reduction of the charge which he made reference to pg. 13 of appellants brief, exhibit 7, and lack of evidence. Instead counsel on pg 1 of brief was redundant in listing issues such as issues 3, 4, and 5 which are essentially 1 issue. The above issues as well as others contained herein should been argued to the extent that they were arguable because they were dead bang winners and upon casual review of the record, would leap off the pages. The reason being, they a admitted to by the state and there was no reason not to reduce the charge or dismiss it at all together as Utah Law and Federal Law require. In this case the Anders brief did not meet the standards to provide effective assistance of counsel on appeal. The brief had no argument. It listed only a few cases but the fact and principles they stood for were not stated. Counsel did not maintain an adversarial stance.

The court of appeals failed to conduct a comprehensive review of the record because the facts of this case are but to obvious from the record. The court further errored because of this courts decisions in Clayton and Dunn -v- Cook (discussed herein) clearly explained what an Anders brief is supposed to contain and the brief in exhibit 7 fell short of the mark. The court could not have been assured that the case was in fact frivolous, or that counsel conducted a comprehensive review of the record and case law which support the claims.

There is a strong likely-hood that substantial injustice has occurred, pursuant to U.R. Crim., P. rule 30(a), the errors raised here in and the proposition mandamus stands for. It is prayed that this court grant the relief requested herein.

Why the writ should be issued.

Mandamus is an extra ordinary writ which lies to compel performance of ministrial act or mandatory duty where there is a clear legal right in plaintiff (petitioner), a corresponding duty in defendant and a want of any other appropriate and adeqauet remedy. Mandamus has traditionally issued in response to abuse of judicial power.

Thus when a district judge refuses to take some action he is required to or takes some action he is not empowered to take, mandamus will lie.

In this case the court refused to take action that it was required by law to take, such as granting the motion to dismiss or reducing the charge to manslaughter based on lack of proof, see 76-1-501 U.C.A., refused to grant arrest of judgement or in the alternative a new trial based on issues contained herein, as required by law.

The greatest requirement of law disregarded by the court was its appointment of counsel who petitioner has had conflict with. This judicial No No was scorned in Osborn -v- Shillinger 861 F2d 612 (10th cir 1988) and U.S. -v- Cronic 466 U.S. 648 (1984) and is governed by Strickland -v- Washington 466 U.S. 668 (1984) and Cuyler -v- Sullivan 446 U.S. 335 (1980).

The writ should issue because the court is not empowered with authority to strip petitioner's 14th amendment due process right to effective assistance of counsel on his first appeal of right. The

court, as stated above, committed numerous error. The court is required by law and Canon, to uphold the integrity of the law, not commit plain error! There is a clear legal right that petitioner asserts, a corresponding duty in the defendant to assist in appointing the proper remedy, vacation of the judgement, enter a new one whereupon an appeal may be taken from the new judgement, Rodriquez -v- U.S. 395 U.S. 327,332 (1969); U.S. -v- Wenterhalder, 724 F2d 109 (10th cir. 1983) (Per Curiam)(discussing remedies).

Further the court of appeals failed to undertake a comprehensive review of the record to determine if in fact the appeal was frivolous. Based on the discussion of the facts, supra at 1-4, the court failed to abide by this courts decision in State -v- Clayton 639 P2d 168 (UT. 1981) see Anders brief of appellant exhibit 1 and counsel in filing that brief, failed to comply with Clayton directions thus constituting ineffective assistance of counsel depriving petitioner of effective first appeal of right.

Reasons for filing the writ in this court

It is imperative that the highest court in the state decide the constitutionality of the issues and procedures complained about herein in a fast efficient manner without intervention by lower courts which can only serve to delay the end result. The integrity of Utah's court system must be maintained. Secondly any federal review of petitioners claims of procedural irregularity will have to await the exhaustion of state remedies which includes a decision by the highest state court of jurisdiction. To litigate this matter in lower inferior courts would only ultimately delay the correction of any constitutional problem this case presents, or procedural irregularities the lower courts have with interpreting state and federal law.

Third, in the instant case, petitioner has been incarcerated almost 61/2 years for an offense which he is not factually guilty of and the conviction was obtained by plain procedural irregularities and obvious constitutional violations. Petitioner is entitled to the fastest most judicious relief possible because 0f the alleged violations.

The fourth reason is that the statue of limitations implemented in 78-12-31.1 could apply to rule 65 B writ. This inevetabley would be the states argument. That could bar his complaint leaving him

without remedy. There is no time bar against rule19 or rule 20 petition in the Utah rules of appellate, and because the nature of the rights affected, this court would do well in answering these questions and granting the writ. Further, as far as judicial economy is concerned, this court would see this case on appeal at least twice where if this court by its supervisory authority issued the writ, it would only see a first appeal of right. Inferior court proceedings are futile.

This case is governed by many decisions of this court. In this state, this courts decision is controlling law and is based also on stare decisis recognizing decisions of federal courts and the U.S. Supreme Court. In this case many of this courts as well as federal mandates have been disregarded or misconstrued by the district court. It is prayed that this court retain jurisdiction over this case and enter decision on the issues presented herein.

Pertinent attachments

Petitioner attaches two documents where his attorneys withdrew from the case, his motion for new trial/arrest of judgement, appellants brief, states interlocutory appeal and a document that supports that the district court knew that it had appointed Alan K. Jeppeson to a defendant who had an active conflict with him. Documents other than those mentioned above contained in the addendum are pertinent to the support of issues addressed herein.

Conclusion

Types of relief varies in this case to vacation of the judgment to outright reversal which is allowed in a case of gross injustice but relief, because of the documentation offered could result in setting aside the judgement and directing a judgement for manslaughter.

Relief in the form of vacation of judgement and entry of a new judgement would be proper.

It is requested that if this court determines that because of the issues or relief requested herein, remand is necessary and this petition be reviewed as an habeas.

It is requested that this court waive the statue of limitations in §78-12-31.1 because of good cause shown and in the interest of justice. The issues here in warrant review and warrant any time bar to be excused because of issues outlined in the attached "motion to excuse statue of limitations of repealed and re-enacted U.C.A. §78-12-31.1.".

Therefore the petitioner prays that this court retains the case of remand, grants the above named motion and retains jurisdiction as it did in State -v- Gibbons 740 P2d 1309 (Ut. 1987)

Dated this 6 day of October 1995

Doty Lyn Brown

Certificate of Service

I certify that I have mailed postage prepaided a copy of the foregoing to Jan Graham, Utah Attorney General 236 State Capitol, Salt Lake City, Utah 84114 on this day 6 of October 1995.

Doty Lyn Brown

Paul Gotay (1224)
Gotay Law Office
Attorney for Defendant
5085 South State Street
Murray, Utah 84107
Telephone: 801-265-2833

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH Plaintiff, vs. DOTY LYN BROWN Defendant.	MOTION OF ARREST OF JUDGMENT/NEW TRIAL Case No. Judge Raymond S. Uno

STATEMENT OF THE CASE

Defendant, DOTY LYN BROWN, was found guilty as charged of the offense of second degree murder after trial before a jury on February 17, 1990. During the course of the trial, Defendant moved to dismiss or in the alternative to have the charge reduced to a manslaughter at the conclusion of the State's case in chief asserting that the State had failed to provide sufficient evidence to establish that he did so intentionally. The Court denied Defendant's Motion.

LEGAL STANDARD TO BE APPLIED

Defendant now seeks to arrest judgment pursuant to Section 77-35-23 Utah Code Annotated, 1953 as Amended, or in

the alternative to gain a new trial pursuant to Section 77-35-24 Utah Code Annotated, 1953 as Amended.

The Court may entertain a motion to arrest judgment and enter an order in the form of judgment of acquittal notwithstanding the jury verdict if the defendant shows that jeopardy has attached and that the facts proved at trial do not constitute a public offense, or the trial court may enter any other order as may be just and proper under the circumstances upon showing other good cause.

An arrest of judgment requires the trial court to look at the totality of the circumstances before refusing to enter judgment on a verdict because of some error appearing on the face of the record. State v. Owens, 753 P.2d 976 (Utah 1988); State v. Gentry, 747 P.2d 1032 (Utah 1987).

A motion for new trial may be granted in the interest of justice upon the defendant showing that error or impropriety existed which had a substantial adverse impact upon his rights. A motion for new trial differs from an arrest of judgment in that the arrest of judgment requires the court to determine error from the face of the record and may not inquire into proof offered or adduced at trial. A motion for new trial is intended to permit the court to correct its own errors and avoid further review by examining the entire proceedings to determine if a conviction was obtained by unfair or unlawful means. State v. Owens, supra.

ISSUE

Defendant contends that it was error for the Court to deny his motion to dismiss or in the alternative to reduce the charge to a manslaughter at the conclusion of the State's case in chief, and urges this Court to reverse that prior ruling and grant him an appropriate remedy.

ARGUMENT

Resolution of the issue in this case requires examination of the legal standard to be applied in granting or denying a motion to dismiss at the conclusion of the State's case in chief. A motion to dismiss at this stage of trial should be granted if the State has failed to establish a prima facie case. A prima facie case is made when a sufficient amount of direct and circumstantial evidence has been presented on each element of the cause of action to allow the question to be submitted to the jury. State v. Romero, 554, P.2d 216, (Utah 1976). A prima facie case can be made out under direct or circumstantial evidence so long as there exists sufficient evidence for a jury to find guilt beyond a reasonable doubt. State v. Murphy, 617 P.2d 399, (Utah 1980).

There is no dispute that the State showed sufficient evidence at the conclusion of its case for the jury to conclude that the victim's death involved criminal activity. The evidence, however, was not sufficient to prove, beyond a reasonable doubt, that the defendant, even if it is proved

he caused her death, did so intentionally, as was charged in the complaint for murder in the second degree.

The verdict of guilty of murder in the second degree rests entirely on testimony of defendant being with the victim on the evening she disappeared and statements the defendant related to witnesses, wherein he does not admit having committed the crime. The State's experts could not conclude that the murder was committed at close range since evidence supporting said theory was not obtained. The State attempts to infer intent by the fact that the victim's body was placed in a desolate area to avoid detection.

In State v. Petree, 659 P.2d 443 (Utah 1983) a jury convicted defendant of a second degree murder on evidence that showed that the defendant was the last person seen with the victim before she disappeared; that the defendant had made statements referring to the victim; and that the victim was forced into a pit to avoid detection once murdered. The Supreme Court held that the above evidence combined with the fact, if proven, that defendant caused the victim's death, was not sufficient to establish beyond a reasonable doubt that he did so "intentionally".

The State offers the fact that the murder weapon is owned by the defendant and therefore this should differ the instant case from the Petree matter. Defendant proffers that ownership of the alleged murder weapon is insufficient evidence from which the jury may infer "intent". In State v. Bolsinger, 699

P.2d 1214 (Utah 1985) the defendant admitted wrapping a cord around the victim's neck and "....pulling on it". From that statement the State would infer that the defendant intended to kill the victim as alleged. The Supreme Court concluded that the statement and activity failed to establish intent because it was vague as to the defendant's state of mind. The Supreme Court found that even though defendant admitted the deed, his confession offers no clue or hint as to his mens rea. Nothing in the exchange between the defendant and the victim can form a basis from which an inference to kill or harm can be drawn. In the case before this Court, the State acknowledged that the motive for this murder is unknown and the defendant supported his allegation that there was no reason for him to commit said murder, though the testimony of other witnesses.

CONCLUSION

The fact that the alleged murder weapon was owned by the defendant and the fact that the defendant was with the victim the night she disappeared does not establish proof beyond a reasonable doubt the intent element needed for a second degree murder conviction. The State has failed to show, by their own admission, that the defendant's mens rea can be inferred by the circumstances surrounding this case.

PAUL GOTAY
Attorney for Defendant

P.2d]

arounc

stater

to ki

that

becau

Supre

deed,

rea.

vict

can

ackn

the

reas

of c

def

the

a

de

th

in

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of [signature] 1990, I mailed a true and correct copy, postage prepaid the foregoing Motion of Arrest of Judgment/New Trial to:

Ronald Elton
Tooele County Attorney
Tooele County Courthouse
47 South Main Street
Tooele, Utah 84074

[signature]
PAUL GOTAY
Attorney at Law

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of Feb 1990, I mailed a true and correct copy, postage prep the foregoing Motion of Arrest of Judgment/New Trial

Ronald Elton
Tooele County Attorney
Tooele County Courthouse
47 South Main Street
Tooele, Utah 84074

PAUL GOTAY
Attorney at L.

ADDENDUM V

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff and Appellee, vs. DOTY LYN BROWN, Defendant and Appellant.	Case No. 900316-CA

APPELLANT'S BRIEF

Appeal from the conviction of March 12, 1990, in the Third District Court in and for Tooele County, the Honorable Raymond S. Uno presiding, of the crime of Second Degree Murder, a First Degree Felony, in violation of Section 76-5-203 U.C.A., 1953.

ALAN K. JEPPESEN
Attorney for Appellant
85 North Main Street
Tooele, Utah 84074
Telephone: (801) 882-2444
Facsimile: (801) 882-6520

PAUL R. VAN DAM
Utah Attorney General
Attorney for Appellee
236 State Capital
Salt Lake City, Utah 84114

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. Whether it was plain error for the Court to have allowed the defendant to withdraw his motion to suppress the testimony of John O'Neil, ballistic's expert with Department of Alcohol, Tobacco and Firearms.

2. Whether Defendant would have been denied a speedy trial if the trial had been continued while the State proceeded with its interlocutory appeal of the Court's granting of Defendant's Motion to Suppress the testimony of John O'Neil.

3. Whether the Court erred in admitting the transcript and audio taped interview of the defendant when the officers did not record a recitation of defendant's rights under *Miranda*.

4. Whether defendant's statements during the interview with the Tooele County Sheriff's Office were voluntary.

5. Whether the defendant's claim subsequent to trial of physical abuse prior to the taped interview was an exceptional circumstance warranting review by this Court.

6. Whether a mistrial should have been declared when several women jurors were in the rest room at the same time a spectator spoke to the defendant's mother about the victim's death.

7. Whether the defendant was permitted an impartial jury of his peers when many of the jurors knew the prosecutor or some of the Tooele County Sheriff Deputies.

8. Whether the Court erred in denying the defendant's Motion to

Dismiss, made at the conclusion of the State's case in chief.

9. Whether the Court erred in prohibiting Defendant's witness, Mark McDougal, to testify as to the effect of a 41 caliber bullet shot into the head of a human at close range.

10. Whether the Court erred in admitting a cumulative photograph of the victim's corpse over Defendant's objection.

NATURE OF THE CASE

This is an appeal from the conviction of defendant on March 12, 1990, in the Third District Court in and for Tooele County, State of Utah, the Honorable Raymond S. Uno, district judge, presiding. Defendant was tried by a jury, who found him guilty of Second Degree Murder, a first degree felony in the death of his wife, Sandra Brown, in violation of Section 76-5-203 Utah Code Annotated, 1953, as amended. The date of Judgment, Conviction and Sentence was March 12, 1990. Defendant's trial counsel moved to withdraw that same date, after first filing a Notice of Appeal. Present counsel was appointed to represent the Defendant for the purposes of his Appeal by an Order entered on May 29, 1990.

STATEMENT OF THE FACTS

The defendant and Sandra McClellan were married on May 7, 1988. They resided in Weber and Davis County most of their married life. About December 3, 1988, defendant left home[1]. On December 10, 1988, the victim's

[1]Ernie Erickson's cross examination, Tr. Vol IV., pp. 112-113.

daughter[2] and a family friend[3] drove the victim to the Salt Lake airport so that she could take a flight to Denver[4] to meet her husband. That was the last time any of her family or friends saw her alive. (T. Vol. VI, p. 109, lines 18-19). On December 24, 1988, the defendant left a note on his parent's automobile while they were visiting their daughter, Lisa Stapley, who was also the defendant's sister, to the effect that Sandra had "taken a bullet meant for me" and he had lost the only person he loved (T. Vol. IV, pp.199, 201, lines 1-2). Upon going to their car to leave, his parents discovered the note, went back in the house to read it, and gave the note to Stan Jones, a detective with the Riverside, California police department,[5] who was visiting Lisa for the holidays.

After Defendant's parents left for home, Defendant came to Lisa's door and was invited in. Stan Jones, believing that Defendant's note was strange, and may have involved a murder, sat in the back of the living room out of the lighted portion of the room[6] and listened to the defendant as he talked to his sister. He appeared to be depressed, but would on occasion become agitated and would get up from the kitchen table where he and Lisa were sitting and walk around the room talking in an agitated manner (Tr., Vol. V, pp. 161, 185,

---

[2]Nikki McClellan, who was 17 at the time of the incident and had been living with Sandra and Doty (Tr. Vol. V, pp. 205, 208).

[3]Ernie Erickson, who had been defendant's friend since grade school. (Tr. Vol. VI., p. 110-111).

[4] Tr. Vol V, pp. 206, 208, line 15.

[5]Tr. Vol. VI, pp. 124-125.

[6]Tr., Vol. V, p. 158-159.

lines 20-25; 186). At one point Defendant asked for a drink and got up to get a beer from the refrigerator. When he did so, he removed a revolver from his pants and placed it on the kitchen table (Tr. Vol. V, p. 162). Stan Jones went to the table and took the pistol while defendant was getting the beer from the refrigerator and retreated to his hiding place. When the Defendant discovered the pistol missing, he became angry. Stan identified himself and told him he had the pistol and would return it to the Defendant when he left the residence. An argument ensued and it was settled by Stan putting the pistol in Defendant's pickup truck and defendant locking the doors. While going to the Truck, Stan removed five unfired shells from the gun (Tr. Vol. V, pp. 166, lines 19-23; pp. 170-171; Exhibit 42). They were 41 magnum caliber bullets (Tr. Vol. V, p. 163,).

After leaving Lisa's home, defendant went to his parent's home in Ogden. His mother testified that it was understood that Sandra was dead, and that the defendant was depressed because of it, but the family did not talk about the incident in any detail, (Tr. Vol. VI, p. 127) except to understand that Sandra and Doty had been ambushed by someone in Southern Utah , and Sandra had been shot by mistake when the people had tried to shoot the defendant (Tr. Vol. IV, p.201).

On Saturday, March 24, 1989, a group of fathers and their sons were rabbit hunting on the West side of Johnson's Pass in Tooele County, when two of the teenage boys saw, what they thought to be a discarded mattress. They discovered, upon closer observation, that the object was a corpse (Tr., Vol. III, p. 187). The Tooele County Sheriff's Office was called to investigate, and the

Sheriff called the State Medical Examiner's office to assist. During the course of the investigation, fragments of three bullets were found. One, Exhibit 18, was found within the victim's skull[7] (Tr. Vol III, p. 244-246; Vol IV, pp. 120, 144).) and two were found under the body in the dirt (Exhibits 17 and 19; Tr. Vol. III, pp. 241-243; Vol IV, p. 121-124). During the investigation, it was also discovered that the Defendant had purchased a Smith and Wesson Model 57 41 magnum caliber pistol (Tr. Vol III, p. 255; Vol IV, p. 159) from Galleson's on December 6, 1988 (Tr. Vol IV, p. 158) in his own name. He sold the same revolver to Pahl's Pawn Shop on January 27, 1989 (Tr. Vol IV, p. 177-182). Defendant through his attorney admitted to the same at trial (Tr. Vol V, p. 202).

The pistol was recovered from Pahl's Pawn Shop and delivered with the bullet fragments to the State Crime Lab (Tr. Vol V, p. 28). Robert Brinkman, the bureau chief of the State Crime Lab, (Tr. Vol V, p. 22, lines 15-17) compared the three fragments to two bullets he test fired from the firearm. In his opinion, the bullet found in the dirt under the victim's head, Exhibit 19, was fired by the defendant's pistol, (Tr. Vol. V, p. 103; Vol IV, p. 143), and the fragment found in her head, Exhibit 18, (Tr. Vol. IV, pp. 56, 144), was also consistent with having been fired from the defendant's revolver, but he could not say with scientific assurance that the other fragment found in the dirt under the victim's body was fired from that gun. (Tr. Vol. IV, p. 57, lines 7-9).

The State called a second ballistic's expert, Mr. John O'Neil, an employee

[7]The Defendant stipulated that the victim found was his wife, Sandra Brown (Tr. Vol IV, p. 168, lines 18-24).

of the U. S. Bureau of Alcohol, Tobacco and Firearms. (Tr. Vol. IV, p. 110). Prior to the commencement of trial, the Defendant had filed and argued a motion to suppress the testimony of Mr. O'Neil on the grounds that the State had not complied with the discovery requests of the Defendant, by failing to timely inform the Defendant that Mr. O'Neil was going to be a witness or the nature of his testimony (Tr. Vol I, p. 8). After lengthy argument, the Court granted the defendant's motion to suppress (Tr. Vol I, p. 18), whereupon the State filed an interlocutory appeal and obtained a restraining order from the Supreme Court prohibiting the continuance of the trial until the interlocutory appeal was heard (Tr. Vol. II, p. 38). The defendant, then sought to be released on bail (Tr. Vol. II, p. 56, lines 16-19). The Court fashioned a bail of $30,000 based upon a property bond of $60,000 with the proviso that the same bond could be used by the defendant on other charges pending in two other courts (Tr. Vol II, p. 62, lines 2-10; p. 63, lines 20-25 and p. 64, line 1). The Defendant's counsel asked for a short recess to discuss the matter with his client (Tr. Vol. II, p. 67, lines 21-25), and upon returning, informed the Court that the defendant could not meet the bail requirements and did not want to wait in jail while the trial was suspended by the interlocutory appeal, and was therefore withdrawing his Motion to Suppress[8] (Tr. Vol II, p. 68, lines 19-25; p. 69, lines

[8] "MR. GOTAY: Yes, Your Honor. For the record, let it be known that my client, Doty Brown, was present during discussions of the issues before the court, and we took a recess so that I could discuss the matter with my client, so that he had a better understanding of the repercussions and options left to him. And after considerable debate, my client has decided that he would, he's requested that I withdraw my motion to suppress the ballistics expert that the state wants to include, . . . with the caveat that he's doing so because he values more a speedy trial than postponing this matter for an additional sixty

1-7). Mr. O'Neil testified that based upon his education, training and experience, as well as his examination of the defendant's firearm, Exhibit 26, the three bullet fragments, Exhibits 17-19, the two bullets which had been fired by Robert Brinkman from the defendant's gun, Exhibit 41, (Tr. Vol V, p. 29, lines 14-22) and two bullets he fired from the defendant's gun, (Tr. Vol. V, p. 119, lines 1-17), that without any doubt the three fragments, Exhibits 17-19 were fired from the defendant's gun and from no other (Tr. Vol. V, p. 123, lines 14-15; p. 125, line 25 and p. 126, lines 1-7; p. 127, lines 11-17; p. 128, lines 22-25 and p. 129, lines 1-12). He also testified that it was easier to identify Exhibit 18, the fragment taken from the head of the victim, after soaking and washing the blood and tissue out of the scire on the fragment (Tr. Vol. V, p. 126, lines 17-25). While the defendant's counsel carefully and expertly cross examined each of the State's witnesses, in great detail, all of the above testimony came into evidence without objection.

Rudy Reit, an investigator on the Staff of the State Medical Examiner's Office (Tr. Vol IV, p. 63, lines 5-8) testified that the victim had been shot at the scene where the body was found (Tr. Vol IV, p. 70, lines 19-22). Dr. Edward Leis, who was a fellow in training in forensic pathology with the Utah State Medical Examiner at the time of his autopsy of the victim's body (Tr. Vol IV, p. 97, lines 21-22)[9], testified that he performed the autopsy on the victim's body (Tr. Vol IV., p. 100, lines 2-20). He found that a bullet had gone through

---

or ninety [days]."

[9]Defendant stipulated to his qualifications as an expert in the area of forensic pathology (Tr. Vol VI., p. 99, lines 2-4).

the hood of the victim's sweater which was bunched up behind her head, without striking her body (Tr. Vol IV., p. 104, lines 2-13). He also observed a gun shot entrance wound on the left side of the victim's nose (Tr. Vol IV., p. 105, lines 7-15). There was evidence of gun powder within the wound which led him to believe that the weapon had been at close range, about an inch or closer when fired (Tr. Vol IV., p. 107, lines 2-19). He testified that in his scientific opinion the victim died of a gun shot wound to the head, and that there was only one wound to her body (Tr. Vol. IV, p. 116, lines 14-25, p. 117, lines 1-3). All of this evidence came in without objection.

SUMMARY OF DEFENDANT'S ARGUMENT

This is a case involving circumstances only. There is no direct evidence placing Defendant at the scene of the victim's body, and there was no motive for the crime (Tr. Vol III, p. 168, line 21). The uncontroverted evidence was that the Defendant loved his wife, and was always mindful of her well being (Tr. Vol VI., p. 130, lines 5-12; p. 106, lines 24-25, p. 107, lines 1-6; p. 91, lines 2-8). The Defendant was not a violent person, and there is no evidence that he was had a explosive temper or was cruel (Tr. Vol VI, p. 131-132, lines 1-10). From the commencement of the case, when the Defendant was first interviewed by the two deputies from Tooele County, he maintained that he did not kill his wife, but that she was killed in an ambush by government agents (Vol III, p. 178, lines 21-23; Vol VI, p. 100, lines 11-15; p. 118, lines 15-25, p. 119, lines 1-2; p. 127, lines 8-13; Exhibit 2; Vol VI, p. 40, lines 17-25; p. 72, lines 2-22). There was also abundant, uncontroverted testimony by those who knew Doty

best that he and Sandra had been afraid of someone pursuing them for several weeks before Sandra flew to Denver to meet her husband (Vol. VI, p. 94, lines 20-25, p. 95, lines 1-24; p. 107, lines 7-16; p 138, lines 2-18). Hence, Defendant established a reasonable explanation for the criminal death of his wife which was not refuted by the State. Lastly, Defendant had maintained from the first time he was examined by the investigators that he had taken Sandra's body to a remote spot by Nephi, and that she had not died at the spot where her body was found by the hunters (Tr. Vol. III, p. 181, lines 3-5; Vol. VI, p. 29, lines 9-14; p. 40, lines 12-25). Uncontroverted evidence existed to support the defendant's position: The sun glasses which were worn by the victim had a lens missing (Tr. Vol IV, p. 65, lines 13-23). That lens was found some 73 feet from her body (Tr. Vol VI., p. 155, lines 10-24). The victim's clothes, including her white boots, did not have any mud or debris which would indicate that she had walked to the site where her corpse was found (Tr. Vol. IV, p. 90, lines 16-25, p. 91, lines 1-13). Finally, there was no evidence of lividity[10] present in the body (Tr. Vol. IV, p. 80, lines 3-6). The absence of lividity supported defendant's contention that the victim had been killed elsewhere and brought to the spot where her corpse was found (Tr. Vol. IV, p. 82, lines 3-9). Hence, the defendant provided sufficient evidence to raise a reasonable doubt as to his guilt.

Without the evidence of John O'Neil from the Bureau of Alcohol,

---

[10]Lividity or Liver Mortis, as defined by the witness, Rudy, Reit of the Medical Examiner's Office is the effect of gravity pooling the body fluids at the lowest point of the body after death, causing a darkening of that area of the corpse. (Tr. Vol IV, p. 93, lines 4-25, p. 94, lines 1-7).

Tobacco and Firearms, the State would have had weak evidence that the bullet fragments found in the victim's head and under her body came from the defendant's gun. Robert Brinkman, the ballistic's expert with the Utah State Crime Lab was not as convincing or precise in his testimony about the reliability of his opinion on those issues (Tr. Vol. V, p. 51, lines 21-25, p. 52, lines 1-9; p. 53, lines 2-11; p. 56, lines 3-21; p. 57, lines 1-16; p. 77, lines 11-22). The Court committed plain error to allow the Defendant to withdraw his Motion to Suppress after it was already granted. *State v. Tucker*, 709 P.2d 313 (Utah, 1985) and *State v. Royball*, 710 P.2d 168 (Utah, 1985), citing *State v. McCardell*, 652 P.2d 942, 944 (Utah, 1982).[11] The period of time the defendant would have had to wait for the resumption of the trial would have allowed his counsel to prepare to meet Mr. O'Neil's testimony if the Supreme Court reversed the trial court's granting of the Motion to Suppress, and the time period in jail would have been insignificant compared to the prison sentence upon a conviction based upon that testimony.

While the proper remedy for the tardiness of the discovery revelations of Mr. O'Neil's testimony was suppression, the Supreme Court erred in staying the trial proceedings while the interlocutory appeal was pending. To stay the trial proceedings, denied defendant his right to a speedy trial under the constitution. Rule 27, Utah Rules of Criminal Procedure, governs the granting of stays on

[11]Court's ruling will be reversed if the trial court so abused its discretion as to create a likelihood that injustice resulted. Said considerations should include constitutional rights of the accused.

appeals filed by the State.[12] There simply was no good cause to grant a stay in this instance, and the stay, being granted without a hearing, deprived the defendant of the opportunity to be heard on the issue before the effect of the stay adversely affected him.[13] Hence, he was forced, by the Supreme Court's error to give away his valuable right to suppress Mr. O'Neil's testimony and in effect was convicted as a consequence.[14]

Shortly after his arrest, the two Tooele County deputy sheriffs assigned to investigate the death of Sandra Brown questioned Defendant in the Salt Lake County Jail. As indicated by defendant's affidavit attached to this brief and by this reference made a part hereof, the defendant was physically assaulted and abused by the officers prior to the audio tape recording being commenced. He was never explained his rights to counsel or not to speak to the officers, and the tape recording contains no such admonitions. Yet, the Court allowed the taped interview to be introduced into evidence and given to the jury as Exhibits 48 and 49 (Tr. Vol VI, p. 23-25). The defendant was prejudiced by the introduction of this examination, because he had not been able to speak with an

---

[12]Rule 8 (c), Utah Rules of Appellate Procedure: "Stays in criminal cases pending appeal are governed by Section 77-35-27 Utah Code Ann. 1953, as amended (Rule 27, U. R. Crim. P.)." Rule 27 (a) (3), Utah Rules of Criminal Procedure: "When an appeal is taken by the state, a stay of any order or judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal."

[13]Good cause means a substantial reason; one that affords a legal excuse. *State v. Estencion*, 625 P.2d 1040, 1042 (Haw., 1981).

[14]For good cause to exist for stay of court proceedings, there must be a showing that the appeal will interfere with and prejudice the criminal prosecution. *U. S. V. One Single Family Residence*, 710 F. Supp. 1351, 1352 (S.D. Fla.).

attorney before the recording was made. Had he been able to speak with an attorney, he may not have told the officers about the ambush in Southern Utah, the accidental killing of his wife by the government agents, and his subsequent burial of her body in an area he understood to be in Utah County. He understands that the story is not plausible, and may not have come forth were his constitutional rights protected, and had the Court not erred in allowing the transcript and testimony concerning it to be introduced at trial, *State v. Martinez*, 595 P.2d 897 (Utah, 1979); *State v. Velarde*, 734 P.2d 440 (Utah, 1986).[15]

During the course of the trial, several of the female jurors were in the women's rest room at the Court house during a recess when a Mrs. Walker, a spectator of the trial began questioning defendant's mother about the victim's death. While the Court interrogated all of the women jurors about the incident, and only one stated she had heard anything at all, and she said she could not really understand what was being said, (Tr. Vol. VI, pp. 34-39) to avoid the taint of impropriety, the Court should have declared a mistrial and called a new jury to hear the matter, *Putro v. Baker*, 410 P.2d 717 (Mont., 1966)[16]

The defendant was granted many of his challenges of prospective jurors for cause, (Tr. Vol. III, pp. 71, 83, 88, 109) he was denied his challenge of two members of the panel, Messrs. Nix and Downey (Tr. Vol. III, pp. 115, 89). Mr. Nix knew Alan James, the State's chief criminal investigator, several other police

---

[15]But see Fjeldsted v. Cox, 611 P.2d 382 (Utah, 1980), Miranda rights only have to be explained when the statements are inculpatory, not when they are exculpatory.

[16]An improper jury influence which has a natural tendency to prejudice the verdict is grounds for a mistrial.

or sheriff's deputies, (Tr. Vol., III, p. 111) he grew up in the same neighborhood as the county attorney who tried the case, and knew him in school (Tr. Vol III, p. 113). Mr. Evensen knew several of the deputy sheriffs, including Alan James. He called them by their first names (Tr. Vol. III., pp. 86-89). Defendant should have been allowed a panel of prospective jurors who had no personal acquaintanceship with any of the witnesses, parties or their counsel, *Goff v. Kinzle*, 417 P.2d 105 (Mont., 1966) and *Salt Lake City v. United Park City Mines, Co.*, 503 P.2d 850 (Utah, 1972).[17]

At the conclusion of the State's case, the defendant moved to dismiss (Tr. Vol. 84), arguing that this case is not significantly different from *State v. Petri*, 659 P.2d 443 (Utah, 1983). The last person to have seen the victim was probably the defendant. There was no direct evidence, however linking her death to the defendant or placing him at the scene of her death. Just as in the *Petri* case, there was not enough evidence to convict the defendant. The State had failed to carry its burden of proof, and hence, he should be acquitted and the case dismissed. The Court erred when it failed to grant that motion, or at least reduce the charge.

Defendant did not have the funds with which to obtain more than one expert witness to counter the testimony of the State's witnesses, including the medical examiner, medical examiner's investigator, and the two ballistics experts. However, he did call one witness, a person who had possessed federal firearms license for six years, had a bachelor's degree from Brigham Young University

[17] Improper conduct charged to one juror is chargeable to the entire panel, and the finder of fact may not go outside the evidence in reaching a verdict.

and a Juris Doctor degree from the University of Puget Sound, who had been a deputy county attorney in Thurston County, State of Washington in the major felony division for one year and worked on six homicide cases. He had also clerked for the Superior Court and was familiar with several homicide cases involving firearms. He was then a City Prosecutor for a City Attorney, and handled many firearms cases (Tr. Vol. VI, p. 144-145). The defendant intended to offer his testimony as to the powder marks, etc., that would have been found upon the victim's face had she been shot as the State's witnesses had testified (Tr. Vol. VI, p. 147, lines 20-25, p. 148, lines 1-3 and 12-14). The Court would not accept the witness as an expert, thereby depriving the defendant of his only expert testimony to rebut the experts who testified for the State. The Court should have permitted the witness to testify out of the presence of the Jury to first determine exactly what the witnesses qualifications were, before denying the witness the right to be examined before the Jury, and disqualifying him only on the arguments of counsel (Tr. Vol VI, pp. 184, line 16 through p. 152, line 22). If the proper foundation had been laid, including the expertise of the witness, his degree of familiarity with the necessary facts, and the logical nexus between his opinion and the facts adduced, his opinion would have been admissible. *Edward v. Didericksen*, 597 P.2d 1328 (Utah).

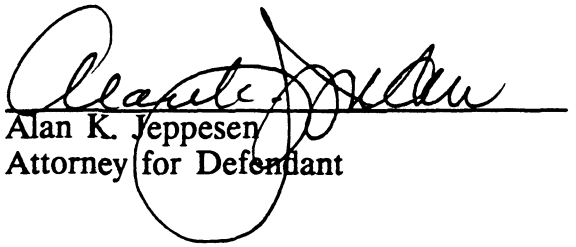
CONCLUSION

In conclusion, it is the defendant's position that an accumulation of errors convicted him. Had John O'Neil not testified, had his examination at the Jail not been introduced, had his expert not been excluded, had a truly impartial jury panel been selected, had the court granted his motion to dismiss been granted, he would have been acquitted. The accumulation of these errors led to an unfair and prejudicial trial, and his conviction should be reversed and he should be released from incarceration.

Finally, after a thorough and conscientious examination of the record, counsel for Defendant has concluded that the appeal of this matter is wholly without merit, and pursuant to the provisions of *State v. Clayton*, 639 P.2d 168 (1981), counsel has prepared this brief raising all issues which could arguably be brought for Defendant. Counsel has informed Defendant that should he wish to address the Court on the issues raised or such other issues as he may decide have merit, that he would be given an opportunity to do so, but that counsel would move the Court to permit his withdrawal from the case. Defendant has requested that counsel move the Court to grant him an additional sixty (60) days within which to prepare his own brief on appeal, and counsel has prepared a

separate motion to that effect and submits the same to the court contemporaneously with this brief [18]

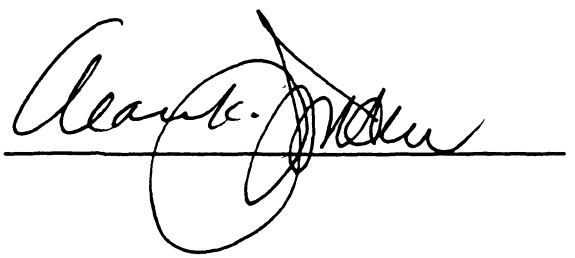
Respectfully submitted,



Alan K. Jeppesen
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I caused four copies of the foregoing Brief of Appellant to be mailed, postage prepaid this 25 day of September, 1990, to Paul R. VanDam, Utah Attorney General, 236 State Capital, Salt Lake City, Utah 84114, and Doty Lyn Brown, Defendant, P. O. Box 250, Draper, Utah 84020.



[18] *State v. Varner*, 692 P.2d 753 (Utah, 1984).

APPENDIX

CERTIFICATE OF SERVICE

I, Doty L. Brown, certifies that I have mailed, postage pre-paid, a copy of "Affidavit of Impecuniosty", "Motion for Appointment of Counsel and Order", and Motion for Preparation of Transcripts and Court Records and Order" to the Utah Attorney Generals Office, Ms. Jan Graham, Attorney General 330 South 300 East, Second floor Salt Lake City, Utah 84111-2525. Deposited in the Mail at Utah State Prison on this 6 day of October, 1995.

/s/ Doty L. Brown

Doty L. Brown
Petitioner Pro-Se'